California
Fair Political
Practices Commission

May 8, 1989

Mark A. Borenstein
Tuttle and Taylor
Attorneys at Law
355 South Grand Ave.
Fortieth Floor
Los Angeles, CA 90071-3101

Re: Your Request for Advice
Our File No. A-89-085

Dear Mr. Borenstein:

This is in response to your request for advice regarding application of the provisions of the Political Reform Act (the "Act")[1] to pro-bono legal services provided by your firm to a candidate for elective office.

This letter raises a significant policy question in the wake of Proposition 73. Consequently, we will refer this letter to the Commission for consideration at its next meeting. Meanwhile we will provide you with interim advice.

QUESTION

Are the pro bono legal services provided by Tuttle and Taylor to a candidate for city council "contributions" for purposes of the Act?

CONCLUSION

Pro-bono legal services provided by Tuttle and Taylor are "contributions" to the extent that employees of Tuttle and Taylor have spent more than 10 percent of their compensated time in any month on the law suit.

FACTS

Tuttle and Taylor is a law firm in Los Angeles. The law firm has provided legal services on a pro-bono basis to Garland

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[1] Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

Hardeman, a candidate for the Fourth District City Council seat in Inglewood. Mr. Hardeman challenged the results of a June 1987 run-off election in which his opponent was declared the victor. Mr. Hardeman's election challenge was premised upon allegations that his opponent's campaign had obtained a large total of illegally-cast absentee votes.

The Center for Law in the Public Interest contacted Tuttle and Taylor regarding Mr. Hardeman's situation and recommended the case as a worthy pro-bono project, given its large potential impact on the interpretation of election laws governing the absentee voting process. Tuttle and Taylor successfully represented Mr. Hardeman at trial on the case in September 1987. Tuttle and Taylor has continued to represent Mr. Hardeman throughout the post-trial motions and during the present appeal.

The greatest amount of work done on Mr. Hardeman's case was accomplished in September of 1987. At that time significantly more than 10 percent of the compensated time of at least one of the attorneys with Tuttle and Taylor was committed to the law suit. Since that time, however, far less than 10 percent of any attorney time in a given month has been utilized for the case.[2]

ANALYSIS

Section 82015 includes in the definition of "contribution" the following:

> ...the payment of compensation by any person for the personal services or expenses of any other person if such services are rendered or expenses incurred on behalf of a candidate or committee without payment of full and adequate consideration.

The definition of "person," for purposes of the Act, includes a corporation. Thus, where Tuttle and Taylor provided pro-bono legal services to candidate Hardeman, and, in so doing paid a salary or other compensation to employees of Tuttle and Taylor for the pro-bono legal services, the salary or other compensation paid by Tuttle and Taylor are contributions to Mr. Hardeman.

Regulation 18423 (copy enclosed) provides an exception within the confines of the reporting requirements of the Act. That regulation allows payment of salary or other compensation by an employer to an employee to go unreported as a contribution where the employee spends 10 percent or less of his or her compensated time in a month rendering services for political purposes.

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[2] This information is based on our March telephone conversation.

Thus, in determining whether Tuttle and Taylor has made reportable contributions to Mr. Hardeman, you must determine whether any of the firm's employees spent more than 10 percent of his or her time on the case in a given month. As your facts indicate, the threshold 10 percent of compensated time was exceeded during the first month of the case, in September of 1987. Since that time, however, you believe than far less than 10 percent of any employee's time has been utilized for the case.

Consequently, for the month of September 1987, and any other month where the 10 percent threshold is exceeded, Mr. Hardeman received contributions from Tuttle and Taylor. He must report, as a contribution from Tuttle and Taylor, the full amount of compensation for work on his case paid to the employees who worked on that case for more than 10 percent of their compensated time. If such contribution from Tuttle and Taylor totaled $10,000 or more in a calendar year, then the law firm must also report the contribution by filing a campaign statement as a major donor committee. (Section 82013(c); Section 84200(b).)[3] I have enclosed a campaign disclosure report amendment form and major donor form and manual in order to facilitate any filings required as a consequence of this advice.

The advice presented here is based on past policy of the Commission. Your question raises significant policy issues in light of the contribution limitations mandated by Proposition 73. Thus, we are referring this letter to the Commission for review at its next meeting. In order to ensure that Tuttle and Taylor do not run afoul of the contribution limits currently in effect, we recommend at this time that any work done by your staff be done on noncompensated time, or minimally, not exceed 10 percent of their compensated time in a given month.

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[3] Commencing January 1, 1989, Tuttle and Taylor may not contribute more than $1,000 per fiscal year to any candidate or officeholder, or his or her controlled committee. (Section 85301.) A "fiscal year" is the period from July 1 through June 30. (Section 85102(a).)

If you have any questions regarding this letter, please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel

By: Lilly Spitz
Counsel, Legal Division

KED:LS:plh
Enclosures

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WRITER'S DIRECT DIAL NUMBER:

(213) 683-0605

January 27, 1989

Robert E. Leidigh, Esq.
California Fair Political Practices Commission
428 J Street
Suite 800
P.O. Box 807
Sacramento, CA 95804-0807

Re: Request for Advice re Pro Bono Legal Services.

Dear Mr. Leidigh:

We are writing to obtain your advice regarding the application of the Political Reform Act (Government Code §§ 81000-91015) to pro bono legal services provided by our firm in connection with a post-election contest pursuant to California Elections Code Section 20050. Tuttle & Taylor has provided substantial legal services on a pro bono basis to Garland Hardeman, a candidate for the Fourth District City Council seat in Inglewood, California. Mr. Hardeman filed an election contest challenging the results of a June 1987 run-off election in which he his opponent was declared the victor. Mr. Hardeman's election contest was premised upon allegations that his opponent's campaign had obtained a large total of illegally-cast absentee votes.

The Center for Law in the Public Interest contacted Tuttle & Taylor regarding Mr. Hardeman's contest and recommended the case as a worthy pro bono project given its large potential impact on the interpretation of election laws governing the absentee voting process. Tuttle & Taylor has provided substantial legal services in successfully representing Mr. Hardeman at trial during the elections contest in September 1987. Tuttle & Taylor has continued to represent Mr. Hardeman throughout the post-trial motions and during the present appeal which is scheduled for oral argument before Division Four of the Second Appellate District on February 14, 1989.

An issue has arisen as to whether Tuttle & Taylor's provision of pro bono legal services must be reported as "contributions" to Mr. Hardeman's campaign pursuant to Section 81002(a) of the California Government Code. We are unaware of any published decisions of the Fair Political Practices Commission which have directly addressed this issue. Accordingly, we request your guidance on this issue.

Please do not hesitate to contact us if you require further information regarding this inquiry, or if you would like a statement of our position on the issue.

Very truly yours,

TUTTLE & TAYLOR

By
Mark A. Borenstein

MAB:rll
cc: Mr. Garland Hardeman

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June 5, 1989

WRITER'S DIRECT DIAL NUMBER:

(213)683-0605

BY FEDERAL EXPRESS

Lilly Spitz, Esq.
Counsel, Legal Division
California Fair Political Practices Commission
428 "J" Street, Suite 800
Post Office Box 807
Sacramento, California 95804-0807

Re: Hardeman v. Thomas
File No. A-89-085

Dear Ms. Spitz:

Thank you for your advisory letter dated May 8, 1989. I agree that it raises a significant policy question under Proposition 73 and, consequently, would appreciate your requesting the Commission to defer consideration of the opinion until its August meeting. I expect, by that time, to have prepared a memorandum concerning your advice letter inasmuch as, at least preliminarily, your letter would have a substantial, chilling effect on pro bono services rendered in connection with the construction and application of California's election laws.

Thank you very much.

Sincerely,

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By
Mark A. Borenstein

MAB:rll
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Thank you very much.

Sincerely,

TUTTLE & TAYLOR

Mark A. Borenstein

By
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MAB:pn

California
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February 7, 1989

Mark A. Borenstein
Tuttle & Taylor
Attorneys at Law
355 South Grand Avenue
Los Angeles, CA 90071-3101

Re: Letter No. 89-085

Dear Mr. Borenstein:

Your letter requesting advice under the Political Reform Act was received on February 6, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Lilly Spitz an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329.)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Diane M. Griffiths

Diane M. Griffiths
General Counsel

DMG:ld

cc: Mr. Garland Hardeman

California
Fair Political
Practices Commission

July 13, 1990

Mark A. Borenstein
Tuttle & Taylor
355 South Grand Avenue, Fortieth Floor
Los Angeles, CA 90071-3101

Re: Our File No. A-89-085

Dear Mr. Borenstein:

The Commission met on July 11, 1990 and reexamined the issue of whether pro bono legal services rendered by a law firm to a candidate for election contest litigation are contributions. Staff suggested that if the Commission desired to reconsider the advice given to you, Regulation 18215(d) could be amended to interpret "volunteer personal services" to include pro bono legal services rendered in connection with election contest litigation. The effect of this amendment would be to remove these legal services from the definition of contribution.

The Commission directed the staff to amend Regulation 18215 by defining what kind of activities qualify as volunteer personal services. As part of this process, the staff will be meeting with members of the California Political Attorneys Association and other persons interested in this amendment. If you desire to participate in these discussions, please contact me and I will keep you informed of their time and place.

In the interim, the Commission has suspended the advice previously given to you, pending an amendment of Regulation 18215. I would anticipate that the pre-notice discussion of the amendment to Regulation 18215 will be on the agenda for the September 5, 1990 Commission meeting.

You may contact me at (916) 322-5901 if you have any questions or comments.

Sincerely,

Scott Hallabrin
Acting General Counsel

By: Jill R. Stecher
Counsel, Legal Division

SH:JRS:plh

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August 31, 1989

Kathryn E. Donovan
General Counsel
California Fair Political Practices Commission
428 J Street, Suite 800
P.O. Box 807
Sacramento, CA 95804-0807

Re: Pro Bono Legal Services as Campaign Contributions
File No. A-89-085

Dear Ms. Donovan:

In June, 1988, Garland Hardeman ran for the Fourth District City Council seat in Inglewood. Because of irregularities in the solicitation and delivery of absentee ballots, Mr. Hardeman sought to challenge the results of that election. The Center for Law in the Public Interest, recognizing the case's potential impact on the interpretation of election laws governing the absentee voting process, urged Tuttle & Taylor to represent Mr. Hardeman on a pro bono basis in order to raise these absentee ballot issues. The Superior Court for Los Angeles County, after trial, interpreted and applied, for the first time, a number of absentee ballot provisions of the Election Code and ultimately set aside the election. The Court of Appeal affirmed. Hardeman v. Thomas, 208 Cal. App. 3d 153, 256 Cal. Rptr. 149 (1989). A new election is scheduled to be held on October 3, 1989. In addition, after the Superior Court decision was widely reported, the legislature amended the Election Code to make many of the solicitation practices evident in this case a misdemeanor. See SB 172 (1988).

Tuttle & Taylor sought your advice as to whether its services constituted "contributions" under the Political Reform Act. You responded that any legal services constituting more than 10 percent of any attorney's monthly compensated time are contributions, and are therefore subject to the campaign contribution limits imposed by Proposition 73. You noted, however, that the case raises an important policy question, and that you would therefore refer the matter to the Commission for consideration at its next meeting.

We agree that the interim advice rendered to us on May 8, 1989, raises significant and unexpected policy concerns. Because of our interest in the matter, Tuttle & Taylor respectfully submits the attached comments, which indicate our understanding of the policy problems and suggest possible resolutions. I would be pleased to discuss these issues further and look forward to the Commission's consideration of the comments.

Sincerely,

TUTTLE & TAYLOR

By
Mark A. Borenstein

MAB:jc

COMMENTS OF TUTTLE & TAYLOR, A LAW CORPORATION

CONCERNING PRO BONO LEGAL SERVICES AS "CONTRIBUTIONS"

Like all other laws, election laws are subject to challenge and interpretation by the courts. Procedural requirements such as standing and mootness, however, confine election law challenges to a single context: contested elections. Election contests therefore provide the primary opportunity to interpret the election laws. In election contests, a court performs two functions: resolving the particular dispute before it, and interpreting the statute or regulation implicated. The former may be only immediately important to the contestants; the latter, however, defines the ground rules for future elections.

Recognizing that election contests provide the only opportunity to interpret election laws, courts have been willing to relax the procedural rules that would keep such cases out of court. Otherwise, unchallenged (and possibly invalid) laws and practices would continue, "capable of repetition, yet evading review." Moore v. Ogilvie, 394 U.S. 814, 816, 89 S. Ct. 1493, 23 L. Ed. 2d 1 (1969). For example, in Knoll v. Davidson, 12 Cal. 3d 335, 116 Cal. Rptr. 97, 525 P.2d 1273 (1974), a candidate

challenged a requirement that she pay a fee to appear on the ballot. Although the candidate was placed on the ballot, the court refused to dismiss the case as moot, since "the basic constitutional issues raised by her petition are of general public interest on matters requiring uniform application of the election laws throughout the state." Id. at 344. See also Canaan v. Abdelnour, 40 Cal. 3d. 703, 709, 221 Cal. Rptr. 468, 710 P.2d 268 (1985); Gould v. Grubb, 14 Cal. 3d 661, 666, 221 Cal. Rptr. 468, 710 P.2d 268 (1985); Zeilenga v. Nelson, 4 Cal. 3d 716, 719-20, 94 Cal. Rptr. 602, 484 P.2d 578 (1971).

Candidates may not have the resources to challenge election laws or procedures, especially when the trial of contested issues involves weeks of testimony and exhaustive post-trial proceedings. Law firms therefore are often called upon to initiate election contests, on a pro bono basis, as Tuttle & Taylor did in the Hardeman case. However, a legal position which seeks judicial guidance with respect to a particular statute or election practice often indirectly promotes the election of one candidate over another.

We believe that few people will disagree with the general proposition that active enforcement of the Election Laws

through election contests helps to preserve the integrity of the election process. Nor is there likely to be dissent from the notion that judicial decisions concerning ambiguous, confusing or new provisions of the Election Code provide useful guidance to city and county clerks who must conduct elections in the future. Yet, the interim advice provided to us by the Commission's General Counsel concerning pro bono legal services as "contributions," if adopted by the Commission, would seriously and, in our view, unnecessarily, undermine both of these objectives.

Law firms would likely be unwilling to provide pro bono services to seek review of elections or, as we did in this case, to challenge the legality of a widespread election practice if the free services performed were reportable "contributions." And in light of Proposition 73, a law firm could not prosecute or defend an election contest on a pro bono basis because the cumbersome procedures for such litigation imposed by the Legislature necessarily require a substantial commitment of time and resources--more than 10% of a lawyer's monthly time and far more than $1,000 per fiscal year. In our view, the inability to secure pro bono representation will effectively prevent all but the largest and best endowed campaigns from enforcing the

substantive and procedural rules regarding elections and will preclude entirely lawsuits which seek clarification of existing statutes. Indeed, the characterization of pro bono legal services as "contributions" even raises the specter of an election victor unable to defend against a wealthy losing candidate or a well-funded losing campaign.

By way of example, Tuttle & Taylor and the Center for Law in the Public Interest committed time valued at more than $200,000 for legal services during trial and on appeal. The City of Inglewood, which was a defendant and the principal appellant, spent more than $60,000 on the appeal and devoted the time of its two senior lawyers, the City Attorney and his Chief Deputy, to extensive pre-trial, trial and post-trial proceedings.

Obviously, the absentee ballot issues involved in the Hardeman case transcended a disputed election in which about 1,200 people voted. Yet, today given the interim advice by the Commission's General Counsel and in light of Proposition 73, the election contest would never have been brought, the illegal conduct which voided the election would never have been publicly aired, and the subsequent clarification of the absentee ballot election laws would never have been obtained. A law firm could

not represent one side without running afoul of the $1,000 "contribution" ceiling and a small campaign could not afford the monumental expense associated with an election contest.

We believe that the Commission is not statutorily bound to consider pro bono legal services in election contests as "contributions." Indeed, it seems to us that the Commission can serve the goals of full disclosure under the Political Reform Act, and yet preserve mechanisms for effective judicial scrutiny of the election process by excluding pro bono election contest litigation from the definition of "contribution" or flexibly applying its existing rules to permit such pro bono litigation without the law firm risking violation of Proposition 73.

I. PRO BONO LEGAL SERVICES IN ELECTION CONTEST CASES SHOULD NOT BE CONSIDERED "CONTRIBUTIONS" BECAUSE THEY ARE NOT PROVIDED FOR "POLITICAL PURPOSES"

Both the Political Reform Act and Proposition 73 seek to prevent undue influence of large contributors in the political process, in part, by requiring full public disclosure of such contributions. Pro bono legal services do not conflict with this goal. Rather, they further it by ensuring that all candidates,

regardless of funding, can protect the propriety of elections and can seek clarification of new or ambiguous election provisions.

The statutory definition of "contribution" provides that what would otherwise constitute a contribution is not considered such when "it is clear from the surrounding circumstances that it is not made for political purposes." Cal. Gov. Code § 82015. The Political Reform Act does not itself define "political purposes," but three regulations promulgated by the Commission do.

Regulation 18215(a), 2 C.C.R. § 18215(a), concerning "contribution," Regulation 18215(b), 2 C.C.R. § 18215(b), defining the phrase "at the behest of" in expansive terms, and Regulation 18423(b), 2 C.C.R. § 18423(b), defining "political purposes" in the context of personal services all declare, in one form or another, that services requested by a candidate constitute "contributions." The bright-line test ignores the evident proposition that personal services can be performed at a candidate's request without constituting an attempt to influence voters.

Tuttle & Taylor, for example, while representing Hardeman "at his behest," took the case at the recommendation of

the Center for Law in the Public Interest. Our representation was motivated by an interest in clarifying absentee voting procedures. Hardeman was undoubtedly incidentally benefited, but only as a by-product of election law reform. To classify our services as a "contribution" simply because a particular candidate requested the services or incidentally benefited from them, in itself, neither promotes the full disclosure objectives of the Political Reform Act nor the effective enforcement of the election laws.

Indeed, these rules and the application suggested by the General Counsel would create unintended results. For example, since under Regulation 18215(b) the City of Inglewood's participation in the lawsuit was "in cooperation, consultation, coordination and concert with" a candidate, Ervin Thomas, its $60,000 in appeal costs and the value of the services rendered by the City Attorney and the Deputy City Attorney in September 1987, are "contributions" to Mr. Thomas' campaign. See 1 FPPC 1 (Feb. 1979) (local governmental agencies are "persons" for purposes of Political Reform Act); FPPC v. Suitt, 90 Cal. App. 3d 125 (1979) (public entities are "persons" under the Political Reform Act). Moreover, Proposition 73 might well prevent a city from defending an election contest challenge brought against it and a winning

candidate because the city will undoubtedly spend more than $1,000 on outside legal services or require a deputy city attorney to spend more than 10% of his or her time in any one month.

Obviously, the interplay between the Commission's regulatory interpretation of the word "contribution" and Proposition 73 contribution limitations, produces results which likely were never considered and, in our view, are undesirable. Accordingly, we believe the Commission should view election contest litigation, when performed on a pro bono basis, as "not made for political purposes." In order to insure that the pro bono representation is disclosed, we suggest that the Commission require disclosure of all election contest litigation by or against the candidate, the name of counsel and whether the litigation is being performed on a pro bono basis.

A flat rule--in effect, a conclusive presumption that pro bono legal services for election contest litigation are not made for political purposes--is needed in order to insure that pro bono counsel does not inadvertently violate the Proposition 73 expenditure limitation. A rule which permits review of the purpose or motivation of the litigation, during or after the

litigation, would again discourage pro bono service under the election contest statutes since, after the fact, lawyers or law firms might be deemed to have contributed more than $1,000.

Admittedly, a flat rule concerning election contests might permit legal services rendered for purely political challenges to escape classification as a "contribution" and the contribution limitation requirements of Proposition 73. However, if disclosure of election contests is required and if all sides of the election contest can freely engage pro bono assistance or elect to pay as reportable expenditures, outside counsel, it seems to us that the principal objectives of the Political Reform Act and Proposition 73 are satisfied and the longstanding legislative mechanism to insure fair elections can be allowed to operate.

II. IF THE COMMISSION CONSIDERS PRO BONO LEGAL SERVICES AS NECESSARILY RENDERED FOR POLITICAL PURPOSES, IT SHOULD CLARIFY ITS METHOD OF CALCULATING THE VALUE OF THOSE SERVICES

Currently, the Commission calculates the value of personal services in a mechanical fashion. Services requiring

less than 10% of an employee's compensated time are excluded. 2 C.C.R. 18423(a). Under some circumstances, this rule may operate too mechanically.

The Federal Elections Commission has addressed this problem in a similar context. 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5465 (Advisory Opinion 1979-58). A partner in a law firm rendered volunteer services to an election committee. The partner argued that, since his compensation was based on his ownership interest in the firm, his compensation did not depend upon the number of hours he worked. The F.E.C. responded:

> You have represented that the senior partner has complete discretion in the use of his/her time and that, accordingly, no reduction of income from the firm would be made even if, for whatever reason, the senior partner spent less time on firm matters than may have been spent during a previous period when no services were provided to the Committee. In such a situation, the Commission concludes that the income from the firm would not constitute an in kind contribution to the Committee for purposes of the Act.

In enacting Section 18423(a), the Commission apparently felt that a bright-line, 10% rule would provide a better way to indicate at what point a lawyer's time is no longer "his own" and instead constitutes compensated time. Like all bright line rules, however, this formula is not responsive to individual cases. For example, the period chosen -- one month -- may drastically overstate the overall proportion of time dedicated by a partner to a project. For example, while one Tuttle & Taylor lawyer devoted about 195 hours to the trial of the Hardeman case in September 1987--considerably more than 10% of his time in that month--this represented about 7% of his total hourly commitment to Tuttle & Taylor for the year 1987. Indeed, this lawyer, for all of 1987, spent less than 10% of his law firm time on the case. And at the end of the year, there was "no reduction of income from the firm" due to the work performed on the Hardeman matter. Since the Commission seems prepared to accept a monthly commitment of 10% or less, which if performed monthly allows 10% of a lawyer's time to be "contributed" without declaring the time to be a "contribution," perhaps the Commission should simply declare that 10% or less on an election contest matter, on an annual basis, does not constitute a "contribution."

In addition, the Commission should define "compensated time" in a flexible manner. Typically full-time lawyers at law firms are not compensated on a "per hour" basis. Rather their compensation, if not based solely on seniority, is the product of an amalgam of factors, including time billed to a client, time devoted to pro bono activities, time used to develop new business and time spent assisting in firm management and new lawyer recruitment. The firm, though, is "compensated" only from billable time. Therefore, from one perspective, pro bono legal services are not part of "compensated time."

On the other hand, a rule which excludes all uncompensated time, from the firm's perspective, would swallow the rule which permits a modest amount of free services to be excluded from the definition of "contribution." Accordingly, we believe "compensated time" should be calculated from the total billable and non-billable contributions made by a lawyer during the prior fiscal year. For example, if a Tuttle & Taylor lawyer contributed 2,500 hours in 1987, he or she could devote 21 hours per month in 1988, or if our proposal that 10% per year be permitted, a total of 250 hours per year on election contest work, without running afoul of the contribution limitations.

CONCLUSION

We strongly believe that pro bono legal services under California's election contest statutes are qualitatively different from other uncompensated services provided to candidates and campaigns. Characterization of pro bono legal services in election contests as "contributions" will cause serious damage to the fragile structure established by the Legislature to police elections, will virtually eliminate election contest litigation as a means of achieving election law clarification and election law reform, and will certainly reserve, as a practical matter, the election contest remedy for fraudulent, illegal or improper elections to the best funded candidates or campaigns. In short, strict application of the Commission's current regulations, in light of Proposition 73, will largely insulate the election process from legal challenge.

Tuttle & Taylor therefore encourages the Commission to articulate a rule that pro bono services under the election contest statutes do not constitute campaign contributions. If necessary to support this interpretation, the Commission should amend its regulations under the Political Reform Act. If the Commission insists on maintaining its current interpretation,

Tuttle & Taylor encourages the Commission to change the manner in which it calculates the value of these services so that some limited amount of pro bono services, sufficient to conduct a modest trial, can be provided without fear of a misdemeanor prosecution or a civil penalty.

DIVISION 13. ELECTION CONTESTS. TIE VOTE

Chapter 1. General Provisions

20000. "County clerk" and "registrar of voters" definition.

As used in this division, "county clerk" does not include "registrar of voters."
(Added by Stats. 1961, c. 23, §20000.)

20001. "Contestant" and "defendant" definition.

When used in this division, "contestant" means any person initiating an election contest. "Defendant" means that person whose election or nomination is contested or those persons receiving an equal and highest number of votes, other than the contestant, where, in other than primary elections, the body canvassing the returns declares that no one person has received the highest number of votes for the contested office.
(Added by Stats. 1961, c. 23, §20001.)

20002. Contest of presidential electors has priority.

In a contest of the election of presidential electors such action or appeal shall have priority over all other civil matters. Final determination and judgment shall be rendered at least six days before the first Monday after the second Wednesday in December.
(Added by Stats. 1977, c. 1205, §63.5.)

Chapter 2. Contests at General Elections

Article 1. Grounds for Contest

20020. Application of chapter.

The provisions of this chapter shall not apply to elections for the office of Member of the Senate or the Assembly of the State of California.
(Added by Stats. 1961, c. 23, §20020.)

20021. Causes for contesting election.

Any elector of a county, city, or of any political subdivision of either may contest any election held therein, for any of the following causes:

(a) That the precinct board or any member thereof was guilty of malconduct.

(b) That the person who has been declared elected to an office was not, at the time of the election, eligible to that office.

(c) That the defendant has given to any elector or member of a precinct board any bribe or reward, or has offered any bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise defined in Division 17 (commencing with Section 29100).

(d) That illegal votes were cast.

(e) That the precinct board in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election as to any person who has been declared elected.

(f) That there was an error in the vote-counting programs or summation of ballot counts.
(Amended by Stats. 1976, c. 1438, §19.2.)

20022. Irregularity or improper conduct of precinct board members.

No irregularity or improper conduct in the proceedings of the precinct board members, or any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the defendant to be declared either elected or one of those receiving an equal and highest number of votes where no one person has received the highest number of votes.

(Added by Stats. 1961, c. 23, §20022.)

20023. Rejection of precinct to change results of election.

When any election held for an office exercised in and for a county is contested on account of any malconduct on the part of the precinct board of any precinct, or any member thereof, the election shall not be annulled or set aside upon any proof thereof, unless the rejection of the vote of that precinct would change the result as to that office in the remaining vote of the county.

(Added by Stats. 1961, c. 23, §20023.)

20024. Illegal votes setting aside an election.

An election shall not be set aside on account of illegal votes, unless it appears that a number of illegal votes has been given to the person whose right to the office is contested or who has been certified as having tied for first place, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have given to that other person.

(Added by Stats. 1961, c. 23, §20024.)

Article 2. Procedure by Contestant

20050. Form of written statement contesting election.

When an elector contests any election he shall file with the county clerk a written statement setting forth specifically:

(a) The name of the contestant and that he is an elector of the district or county, as the case may be, in which the contested election was held.

(b) The name of the defendant.

(c) The office.

(d) The particular grounds of contest and the section of this code under which the statement is filed.

(e) The date of declaration of the result of the election by the body canvassing the returns thereof.

(Added by Stats. 1961, c. 23, §20050.)

20051. Verification of statement of contest.

The contestant shall verify the statement of contest, as provided by Section 446 of the Code of Civil Procedure, and shall file it within the following times after the declaration of the result of the election by the body canvassing the returns thereof:

(a) In cases other than cases of a tie, where the contest is brought on any of the grounds mentioned in subdivision (c) of Section 20021, six months.

(b) In all cases of tie, 20 days.

(c) In cases involving presidential electors, 10 days.

(d) In all other cases, 30 days.

(Amended by Stats. 1977, c. 1205, §63.7.)

20052. When illegal votes is alleged as cause of contest.

When the reception of illegal votes is alleged as a cause of contest, it is sufficient to state generally that in one or more specified voting precincts illegal votes were

given to the defendant, which, if taken from him, will reduce the number of his legal votes below the number of legal votes given to some other person for the same office.

Testimony shall not be received of any illegal votes, unless the contestant delivers to the defendant, at least three days before the trial, a written list of the number of illegal votes, and by whom given, which he intends to prove. No testimony may be received of any illegal votes except those which are specified in the list.

(Added by Stats. 1961, c. 23, §20052.)

20053. Form of statement shall not be cause of rejection.

A statement of the grounds of contest shall not be rejected nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which the election is contested.

(Added by Stats. 1961, c. 23, §20053.)

Article 3. Procedure by County Clerk and Court

20080. Notification to the superior court.

Within five days after the end of the time allowed for filing statements of contest, the county clerk shall notify the superior court of the county of all statements filed. The presiding judge shall forthwith designate the time and place of hearing, which time shall be not less than 10 nor more than 20 days from the date of the order.

(Added by Stats. 1961, c. 23, §20080.)

20081. Citation to the defendant.

The clerk shall thereupon issue a citation for the defendant to appear at the time and place specified in the order, which citation shall be delivered to the sheriff and served upon the party at least five days before the time so specified, either:

(a) Personally, or

(b) If the party cannot be found, by leaving a copy at the house where he last resided.

(Added by Stats. 1961, c. 23, §20081.)

20082. Subpoenas for witnesses.

The clerk shall issue subpoenas for witnesses at the request of any party, which shall be served as other subpoenas. The superior court may issue attachments to compel the attendance of witnesses who have been subpoenaed to attend.

(Added by Stats. 1961, c. 23, §20082.)

20083. Court to meet to determine election.

The court shall meet at the time and place designated, to determine the contested election, and shall have all the powers necessary to the determination thereof. It may adjourn from day to day until the trial is ended, and may also continue the trial before its commencement for any time not exceeding 20 days for good cause shown by any party upon affidavit, at the costs of the party applying for the continuance.

(Added by Stats. 1961, c. 23, §20083.)

20084. Recount of ballots.

At the trial the ballots shall be opened and a recount taken, in the presence of all the parties, of the votes cast for the various candidates in all contests where it appears from the statements filed that a recount is necessary for the proper determination of the contest. The recount shall include a tabulation of all names written upon

a ballot and which are subject to canvass pursuant to Chapter 9 (commencing with Section 17100) of Division 12.

(Amended by Stats. 1976, c. 1438, §19.3.)

20085. Court governed by rules of law and evidence.

In the trial and determination of election contests, the court shall be governed by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable. It may dismiss the proceedings if the statement of the cause of the contest is insufficient, or for want of prosecution.

(Added by Stats. 1961, c. 23, §20085.)

20086. Court shall pronounce judgment.

The court shall continue in special session to hear and determine all issues arising in contested elections. After hearing the proofs and allegations of the parties and within 10 days after the submission thereof, the court shall file its findings of fact and conclusions of law, and immediately thereafter shall pronounce judgment in the premises, either confirming or annulling and setting aside the election. The judgment shall be entered immediately thereafter.

(Added by Stats. 1961, c. 23, §20086.)

20087. Court to declare person elected.

If in any election contest it appears that another person than the defendant has the highest number of legal votes, the court shall declare that person elected.

(Added by Stats. 1961, c. 23, §20087.)

20088. Contestant liable for expenses.

The contestant shall, in the first instance, be liable for the expenses involved in making any recount. He shall pay into court in advance each day such sum as the judge shall find to be sufficient to pay all such expenses as will have accrued by the end of that day. The sums paid shall be part of the costs. The county clerk may pay each day the clerical assistants necessary for such recount from the amount so advanced by the contestant without the necessity of such funds being first deposited with the county treasurer.

(Added by Stats. 1961, c. 23, §20088.)

20089. Application of chapter.

The provisions of this chapter, exclusive of Article 4 (commencing with Section 20110), shall also apply to the recount of votes cast on a ballot measure, insofar as they can be made applicable.

(Added by Stats. 1963, c. 111, §2.)

Article 4. Proceedings After Judgment

20110. Certificate of election.

The person declared elected by the superior court is entitled to a certificate of election. If a certificate has not already been issued to him, the county clerk shall immediately make out and deliver to that person a certificate of election signed by him, and authenticated with the seal of the superior court.

(Added by Stats. 1961, c. 23, §20110.)

20111. Certificate annulled.

If the clerk has issued any certificate for the same office to any other person than the one declared elected by the court, or if the court finds a tie vote in a contest brought under this chapter, the certificate is annulled by the judgment.

(Added by Stats. 1961, c. 23, §20111.)

20112. Judgment for costs.

If the proceedings under this chapter are dismissed for insufficiency or for want of prosecution, or the election is confirmed by the court, judgment for costs shall be rendered against the contestant and in favor of the defendant. If the election is annulled or set aside on the ground of errors of a precinct board in conducting the election or in canvassing the returns, the costs shall be a charge against the county or city where the election was held. When the election is annulled or set aside on any other ground, judgment for costs shall be given in favor of contestant and against the defendant.

(Added by Stats. 1961, c. 23, §20112.)

20113. Apportionment of costs.

Where two or more contested elections are joined for the purpose of recounting votes as in this chapter provided, the costs shall be apportioned among the parties in the discretion of the court.

(Added by Stats. 1961, c. 23, §20113.)

20114. Liability for costs.

Primarily each party is liable for the costs created by himself, to the officers and witnesses entitled thereto, which costs may be collected in the same manner as similar costs are collected in other cases.

(Added by Stats. 1961, c. 23, §20114.)

20115. Appeal judgment of the court.

Any party aggrieved by the judgment of the court may appeal therefrom to the court of appeal, as in other cases of appeal thereto from the superior court. During the pendency of proceedings on appeal, and until final determination thereof, the person declared elected by the superior court shall be entitled to the office in like manner as if no appeal had been taken.

(Amended by Stats. 1967, c. 17, §27.)

20116. Annullment of election; office vacant.

Whenever an election is annulled or set aside by the judgment of the superior court, and no appeal has been taken within 10 days thereafter, the commission, if any has issued, is void and the office vacant.

(Added by Stats. 1961, c. 23, §20116.)

Chapter 3. Contesting Primary Elections

Article 1. General Provisions

20300. Grounds for contesting primary election.

Any candidate at a primary election may contest the right of another candidate to nomination to the same office by filing an affidavit alleging any of the following grounds, that:

(a) The defendant is not eligible to the office in dispute.

(b) The defendant has committed any offense against the elective franchise defined in Division 17 (commencing with Section 29100).

(c) A sufficient number of votes were illegal, fraudulent, forged, or otherwise improper, and that had such votes not been counted, the defendant would not have received as many votes as the contestant.

(d) Due to mistake, error or misconduct the votes in any precinct were so incorrectly counted as to change the result.

(Amended by Stats. 1976, c. 1438, §19.4.)

20301. Naming defendant.

The defendant shall be named in the affidavit.

(Added by Stats. 1961, c. 23, §20301.)

20302. Affidavit specifying irregularities.

The affidavit shall specify separately each precinct in which any irregularity or improper conduct took place, or in which a recount is demanded, and the nature of the mistake, error, misconduct, or other cause of contest, and the date of completion of the official canvass of the board of supervisors of the county last making the declaration.

(Added by Stats. 1961, c. 23, §20302.)

20303. Filing of affidavit.

The affidavit shall be filed in the office of the clerk of the superior court having jurisdiction, within five days after the completion of the official canvass by the board of supervisors of the county last making the declaration.

(Added by Stats. 1961, c. 23, §20303.)

20304. Irregular or improper conduct.

Irregularity or improper conduct shall annul or set aside a nomination only if it appears that illegal votes in the precinct has been given to the defendant, which if taken from him, would reduce the number of his legal votes below the number of votes given to the contestant.

(Added by Stats. 1961, c. 23, §20304.)

20305. Costs in contested election.

The provisions relating to costs in contested final elections apply to contests conducted under this chapter.

(Added by Stats. 1961, c. 23, §20305.)

Article 2. Procedure on Contests Other Than Contests Involving a Simple Recount

20330. Application of article.

This article applies only to contests on the grounds that:

(a) The defendant is not eligible to the office in dispute.

(b) The defendant has committed any offense against the elective franchise as defined in Division 17 (commencing with Section 29100).

(c) A sufficient number of votes were illegal, fraudulent, forged, or otherwise improper, and that had such votes not been counted the defendant would not have received as many votes as the contestant.

(Amended by Stats. 1976, c. 1438, §19.5.)

20331. Place of filing contested election.

If the nomination contested is for an office including a political subdivision of more than one county, the superior court of any county within the political subdivision has jurisdiction, and the contestant may file in any county within the political subdivision. There shall be no change of venue therefrom to any other county within the political subdivision.

(Added by Stats. 1961, c. 23, §20331.)

20332. Serving affidavit upon defendant.

After the affidavit is filed with the clerk of the superior court, a copy of the affidavit shall be personally served upon the defendant or sent to him by registered mail in a sealed envelope with postage prepaid, addressed to the defendant at the place of residence named in his affidavit of registration. The contestant shall make

an affidavit of mailing if he serves the affidavit by mail, and file it on the same day with the county clerk.

(Added by Stats. 1961, c. 23, §20332.)

20333. Filing an answer and a cross-contest affidavit.

The defendant, after receipt of the copy of the affidavit, may file an answer and a cross-contest affidavit within five days.

(Added by Stats. 1961, c. 23, §20333.)

20334. No special appearance.

No special appearance, demurrer or objection may be taken other than by the affidavits which shall be considered a general appearance in the contest.

(Added by Stats. 1961, c. 23, §20334.)

20335. Presenting affidavits to presiding judge; setting time and place of hearing.

The county clerk shall, within five days after the end of the time for filing affidavits, present all the affidavits to the presiding judge of the superior court. The presiding judge shall forthwith designate the time and place of hearing, which shall be not less than 10 nor more than 20 days from the date of the order.

(Added by Stats. 1961, c. 23, §20335.)

20336. Serving of citation setting contest for trial.

The county clerk shall, after an order setting a contest for trial, issue a citation to both parties containing a copy of the order. He shall deliver it to the sheriff who shall serve it either upon the parties or leave it at the residences named in the affidavits of registration of the parties.

(Added by Stats. 1961, c. 23, §20336.)

20337. Time and place for trial.

The court shall meet at the time and place designated in the order setting the contest for trial, and shall have all powers necessary to determine the issues.

(Added by Stats. 1961, c. 23, §20337.)

20338. Court to file findings and pronounce judgment.

After the court has heard the proofs and allegations of the parties, it shall file its findings of fact and conclusions of law and immediately pronounce judgment either confirming the nomination or setting it aside and decreeing contestant nominated.

(Added by Stats. 1961, c. 23, §20338.)

20339. Appeal of judgment.

Either party to a contest may appeal to the district court of appeal of the district where the contest is brought, if the appeal is perfected by the appellant within 10 days after judgment of the superior court is pronounced. The appeal shall have precedence over all other appeals and shall be acted upon by the district court of appeal within 10 days after the appeal if filed.

(Added by Stats. 1961, c. 23, §20339.)

Article 3. Procedure on Contests Involving a Simple Recount

20360. Application of article.

This article applies only to contests on the ground that due to mistake, error, or misconduct the votes in any precinct were so incorrectly counted as to change the result.

(Added by Stats. 1961, c. 23, §20360.)

20361. Superior court has jurisdiction.

The superior court of that county in which is located the precinct in which the contestant demands a recount has jurisdiction

(Added by Stats. 1961, c. 23, §20361.)

20362. Filing of affidavit.

No service other than as provided in this section need be made upon the defendant. The affidavit shall be filed in the office of the clerk of the superior court within five days after the completion of the official canvass. Upon the filing of the affidavit the county clerk shall forthwith post, in a conspicuous place in his office, a copy of the affidavit. Upon the filing of the affidavit and its posting, the superior court of the county shall have jurisdiction of the subject matter and of the parties to the contest. The contestant on the date of filing the affidavit shall send by registered mail a copy thereof to the defendant in a sealed envelope, with postage prepaid, addressed to the defendant at the place of residence named in the affidavit of registration of the defendant, and shall make and file an affidavit of mailing with the county clerk, which shall become a part of the records of the contest.

(Added by Stats. 1961, c. 23, §20362.)

20363. Condition for candidates.

All candidates at any primary election are permitted to be candidates under this code only upon the condition that jurisdiction for the purposes of the proceeding authorized by this article shall exist in the manner and under the conditions provided for by Section 20362.

(Added by Stats. 1961, c. 23, §20363.)

20364. Defendant may file affidavit in his own behalf.

At any time within three days after the filing of the affidavit of the contestant to the effect that he has sent by registered mail a copy of the affidavit to the defendant, the defendant may file with the county clerk an affidavit in his own behalf, setting up his desire to have the votes counted in any precincts, designating them, in addition to the precincts designated in the affidavit of the contestant, and setting up his grounds therefor. On the trial of the contest all of the precincts named in the affidavits of the contestant and the defendant shall be considered, and a recount had with reference to all of those precincts. The contestant shall have the same right to answer the affidavit of the defendant as is given to the defendant with reference to the affidavit of the contestant except that the contestant's answer shall be filed not later than the first day of the trial of the contest.

(Added by Stats. 1961, c. 23, §20364.)

20365. Affidavits presented to presiding judge; designation of time and place of hearing.

On the fifth day after the end of the time for filing contestant's affidavit, the county clerk shall present the affidavits of the contestant and the defendant and proof of posting of contestant's affidavit to the presiding judge of the superior court, or any one acting in his stead, which judge shall forthwith designate the time and place of hearing, which time shall be not less than 10 nor more than 20 days from the date of the order.

(Added by Stats. 1961, c. 23, §20365.)

20366. Appearance of defendant.

The defendant shall appear, either in person or by attorney, at the time and place fixed for the hearing, and shall take notice of the order fixing the time and place from the records of the court, without service.

(Added by Stats. 1961, c. 23, §20366.)

20367. No special appearance by defendant.

The defendant may not make any special appearance for any purpose except as provided in this article. Any appearance whatever of the defendant or any request to the court by the defendant or his attorney shall be entered as a general appearance in the contest.

No demurrer or objection may be taken by the parties in any other manner than by answer, and all the objections shall be contained in the answer.

(Added by Stats. 1961, c. 23, §20367.)

20368. Answer required else court shall proceed.

The court, if the defendant appears, shall require the answer to be made within three days from the time and place set for hearing. If the defendant does not appear the court shall note his default, and shall proceed to hear and determine the contest with all convenient speed.

(Added by Stats. 1961, c. 23, §20368.)

20369. Services of other superior court judges may be obtained.

If the number of votes which are sought to be recounted or the number of contests are such, that the judge in a county in which there is but one superior court judge is of the opinion that it will require additional judges to enable the contest or contests to be determined in time to print the ballots for the election, he may obtain the service of any other superior judge, and the proceedings shall be the same as provided for a county in which there is more than one superior court judge.

(Added by Stats. 1961, c. 23, §20369.)

20370. Presiding judge to designate necessary judges.

If the proceeding is in a county where there is more than one superior court judge, the judge to whom the case is assigned shall notify the presiding judge forthwith of the number of judges which he deems necessary to participate in order to finish the contest in time to print the ballots for the final election. The presiding judge shall forthwith designate as many judges as are necessary to completion of the contest, by order in writing and thereupon all of the judges so designated shall participate in the recount of the ballots and the giving of judgment in the contest in the manner specified in this article.

(Added by Stats. 1961, c. 23, §20370.)

20371. Recount of precincts.

The judges designated by the order to hear the contest, including the judge to whom the contest was originally assigned, shall convene upon notice from the judge to whom the contest was originally assigned, and agree upon the precincts which each one of them, sitting separately, will recount. Thereupon the recount shall so proceed that each judge, sitting separately, shall respectively determine the recount in those precincts which have been assigned to him, so that the ballots opened before one judge need not be opened before another judge or department.

(Added by Stats. 1961, c. 23, §20371.)

20372. Proceedings before judge.

The proceedings before every judge in making a recount of the precincts assigned to him, as to the appointment of the clerk and persons necessary to be assistants of the court in making it, shall be the same as in contested elections. The provisions of Section 20088 of this code apply to the recount.

(Added by Stats. 1961, c. 23, §20372.)

20373. Decision of the court.

When the recount has been completed in the manner required in this article, all the judges who took part, if more than one, shall assemble and make the decision

of the court. If there is any difference of opinion, a majority of the judges shall finally determine all questions, and give a separate decision or judgment in each contest.

(Added by Stats. 1961, c. 23, §20373.)

20374. Judgment of the court is final.

The judgment of the court is final in every respect. No party may appeal.

(Added by Stats. 1961, c. 23, §20374.)

20375. Judgment served upon county clerk.

A certified copy of the judgment shall be served upon the county clerk and may be enforced summarily in the same manner as provided in Section 10015.

(Amended by Stats. 1976, c. 1438, §19.6.)

20376. Judgment served upon Secretary of State.

If the contest proceeds in more than one county, and the nominee is to be certified by the Secretary of State from the compilation of election returns in his office, the judgment in each county in which there has been a contest shall show what, if any, changes in the returns in the office of the Secretary of State relating to that county ought to be made. Certified copies of the judgments shall be served upon the Secretary of State. He shall make such changes in the record in his office as each judgment requires, and conform his compilation and his certificate of nomination accordingly.

(Added by Stats. 1961, c. 23, §20376.)

Chapter 4. Tie Votes

Article 1. Elections Other Than Primary Elections

20500. Application of article.

This article does not apply to any primary election.

(Added by Stats. 1961, c. 23, §20500.)

20501. Determination of a tie vote; special runoff election.

(a) If at any election, except as provided in subdivision (b) and an election for Governor or Lieutenant Governor, two or more persons receive an equal and the highest number of votes for an office to be voted for in more than one county, the Secretary of State shall forthwith summon the candidates who have received the tie votes, whether upon the canvass of the returns by the Secretary of State or upon recount by a court, to appear before him or her at the Secretary of State's office at the State Capitol at a time to be designated by him or her. The Secretary of State shall at that time and place determine the tie by lot. Except as provided in subdivision (b), in the same manner, at a time and place designated by it, the election board shall determine a tie vote, whether upon the canvass of the returns by the election board or upon a recount by a court, for candidates voted for wholly within one county or city.

(b) In lieu of resolving a tie vote by lot as provided in subdivision (a), the legislative body of any county, city, or special district may resolve a tie vote by the conduct of a special runoff election involving those candidates who received an equal number of votes and the highest number of votes.

A special runoff election shall be held only if the legislative body adopts the provisions of this subdivision prior to the conduct of the election resulting in the tie vote. If a legislative body decides to call a special runoff election in the event of a tie vote, all future elections conducted by that body shall be resolved by the conduct of a special runoff election, unless the legislative body later repeals the authority for the conduct of a special runoff election.

If a special runoff election is held pursuant to the provisions of this subdivision, the legislative body shall call for the runoff election to be held in the local entity on a Tuesday not less than 40 nor more than 125 days after the administrative or judicial certification of the election which resulted in a tie vote. If a regular election is to be held throughout the jurisdiction within such time period, the special runoff election shall be held on the same day as, and consolidated with, the regular election.

(Amended by Stats. 1980, c. 564, §1.)

20502. Certificate of election.

If the tie vote has been determined pursuant to Section 20501, the person declared elected by the Secretary of State or the election board is entitled to a certificate of election. The Secretary of State, the county clerk or the city clerk, whichever the case may be, shall immediately make out and deliver to that person a certificate of election.

(Amended by Stats. 1967, c. 376, §2.)

20502.5. Tie for Governor or Lieutenant Governor.

When two or more persons have an equal and highest number of votes for either Governor or Lieutenant Governor, the Secretary of State shall deliver a certificate to that effect to each of the tied candidates. Each tied candidate may present such certificate to the Legislature in such manner as he sees fit.

(Added by Stats. 1975, c. 1203, §9.)

20503. Legislature to determine.

In case any two or more persons have an equal and highest number of votes for either Governor or Lieutenant Governor, the Legislature shall, by a joint vote of both houses, choose one of the persons to fill the office.

(Added by Stats. 1961, c. 23, §20503.)

Article 2. At Primary Elections

20530. Application of article.

This article applies only to:

(a) Candidates for delegates to a national convention for the nomination of party candidates for President and Vice President of the United States.

(b) Candidates for nomination at the direct primary to offices other than nonpartisan offices.

(Added by Stats. 1961, c. 23, §20530.)

20531. Determination of tie by lot.

In case of a tie vote for member of the State Board of Equalization, State Senator, Assemblyman, Representative in Congress or member of a county central committee, where the office is to be voted for wholly within one county, the election board shall forthwith summon the candidates who have received tie votes to appear before it, at a time and place to be designated by the board, and the board shall at that time and place determine the tie by lot.

(Added by Stats. 1961, c. 23, §20531.)

20532. Secretary of State to determine tie by lot.

In the case of tie vote for an office other than a judicial or school office to be voted on in more than one county, the Secretary of State shall forthwith summon the candidates who have received tie votes to appear before him at his office at the State Capitol at a time to be designated by him. The Secretary of State shall at that time and place determine the tie by lot.

(Added by Stats. 1961, c. 23, §20532.)

20533. Summons mailed to candidate.

The summons mentioned in this article shall in every case be mailed to the address of the candidate as it appears upon his affidavit of registration, at least five days before the day fixed for the determination of the tie vote.

(Added by Stats. 1961, c. 23, §20533.)

California Fair Political Practices Commission

May 8, 1989

Mark A. Borenstein
Tuttle and Taylor
Attorneys at Law
355 South Grand Ave.
Fortieth Floor
Los Angeles, CA 90071-3101

Re: Your Request for Advice
Our File No. A-89-085

Dear Mr. Borenstein:

This is in response to your request for advice regarding application of the provisions of the Political Reform Act (the "Act")[1] to pro-bono legal services provided by your firm to a candidate for elective office.

This letter raises a significant policy question in the wake of Proposition 73. Consequently, we will refer this letter to the Commission for consideration at its next meeting. Meanwhile we will provide you with interim advice.

QUESTION

Are the pro bono legal services provided by Tuttle and Taylor to a candidate for city council "contributions" for purposes of the Act?

CONCLUSION

Pro-bono legal services provided by Tuttle and Taylor are "contributions" to the extent that employees of Tuttle and Taylor have spent more than 10 percent of their compensated time in any month on the law suit.

FACTS

Tuttle and Taylor is a law firm in Los Angeles. The law firm has provided legal services on a pro-bono basis to Garland

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[1] Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

Hardeman, a candidate for the Fourth District City Council seat in Inglewood. Mr. Hardeman challenged the results of a June 1987 run-off election in which his opponent was declared the victor. Mr. Hardeman's election challenge was premised upon allegations that his opponent's campaign had obtained a large total of illegally-cast absentee votes.

The Center for Law in the Public Interest contacted Tuttle and Taylor regarding Mr. Hardeman's situation and recommended the case as a worthy pro-bono project, given its large potential impact on the interpretation of election laws governing the absentee voting process. Tuttle and Taylor successfully represented Mr. Hardeman at trial on the case in September 1987. Tuttle and Taylor has continued to represent Mr. Hardeman throughout the post-trial motions and during the present appeal.

The greatest amount of work done on Mr. Hardeman's case was accomplished in September of 1987. At that time significantly more than 10 percent of the compensated time of at least one of the attorneys with Tuttle and Taylor was committed to the law suit. Since that time, however, far less than 10 percent of any attorney time in a given month has been utilized for the case.[2]

ANALYSIS

Section 82015 includes in the definition of "contribution" the following:

> ...the payment of compensation by any person for the personal services or expenses of any other person if such services are rendered or expenses incurred on behalf of a candidate or committee without payment of full and adequate consideration.

The definition of "person," for purposes of the Act, includes a corporation. Thus, where Tuttle and Taylor provided pro-bono legal services to candidate Hardeman, and, in so doing paid a salary or other compensation to employees of Tuttle and Taylor for the pro-bono legal services, the salary or other compensation paid by Tuttle and Taylor are contributions to Mr. Hardeman.

Regulation 18423 (copy enclosed) provides an exception within the confines of the reporting requirements of the Act. That regulation allows payment of salary or other compensation by an employer to an employee to go unreported as a contribution where the employee spends 10 percent or less of his or her compensated time in a month rendering services for political purposes.

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[2] This information is based on our March telephone conversation.

Thus, in determining whether Tuttle and Taylor has made reportable contributions to Mr. Hardeman, you must determine whether any of the firm's employees spent more than 10 percent of his or her time on the case in a given month. As your facts indicate, the threshold 10 percent of compensated time was exceeded during the first month of the case, in September of 1987. Since that time, however, you believe than far less than 10 percent of any employee's time has been utilized for the case.

Consequently, for the month of September 1987, and any other month where the 10 percent threshold is exceeded, Mr. Hardeman received contributions from Tuttle and Taylor. He must report, as a contribution from Tuttle and Taylor, the full amount of compensation for work on his case paid to the employees who worked on that case for more than 10 percent of their compensated time. If such contribution from Tuttle and Taylor totaled $10,000 or more in a calendar year, then the law firm must also report the contribution by filing a campaign statement as a major donor committee. (Section 82013(c); Section 84200(b).)[3] I have enclosed a campaign disclosure report amendment form and major donor form and manual in order to facilitate any filings required as a consequence of this advice.

The advice presented here is based on past policy of the Commission. Your question raises significant policy issues in light of the contribution limitations mandated by Proposition 73. Thus, we are referring this letter to the Commission for review at its next meeting. In order to ensure that Tuttle and Taylor do not run afoul of the contribution limits currently in effect, we recommend at this time that any work done by your staff be done on noncompensated time, or minimally, not exceed 10 percent of their compensated time in a given month.

---

[3] Commencing January 1, 1989, Tuttle and Taylor may not contribute more than $1,000 per fiscal year to any candidate or officeholder, or his or her controlled committee. (Section 85301.) A "fiscal year" is the period from July 1 through June 30. (Section 85102(a).)

If you have any questions regarding this letter, please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel

By: Lilly Spitz
Counsel, Legal Division

KED:LS:plh
Enclosures

(Regulations of the Fair Political Practices Commission
Title 2, Division 6 of the California Administrative Code)

18423. Payments for Personal Services as Contributions and Expenditures (Gov. Code Sections 84211, 82015, 82025)

(a) The payment of salary, reimbursement for personal expenses, or other compensation by an employer to an employee who spends more than 10 percent of his compensated time in any one month rendering services for political purposes is a contribution, as defined in Government Code Section 82015 and 2 Cal. Adm. Code Section 18215, or an expenditure, as defined in Government Code Section 82025 and 2 Cal. Adm. Code Section 18225, by the employer if:

(1) The employee renders services at the request or direction of the employer; or

(2) The employee, with consent of the employer, is relieved of any normal working resonsibilities related to his employment in order to render the personal services, unless the employee engages in political activity on bona fide, although compensable, vacation time or pursuant to a uniform policy allowing employees to engage in political activity.

(b) Personal services are rendered for political purposes if they are carried on for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of one or more candidates, or the qualification or passage of any measure, and include but are not limited to:

(1) Personal services received by or made at the behest of a candidate or committee by an employee; and

(2) Hours spent developing or distributing communications that expressly advocate the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure.

(c) The amount of the contribution or expenditure reportable pursuant to this regulation is the pro rata portion of the gross salary, reimbursement for personal expenses or compensation attributable to the time spent on political activity.

(d) This regulation does not affect the obligation of an employer or any other person to report expenditures and contributions other than the salary, reimbursement for personal expenses, or compensation for personal services of an employee.

(e) Notwithstanding the provisions of subsection (a), salary, reimbursement for personal expenses and compensation paid to an employee by an employer who has contracted to provide services to a candidate or committee are not contributions or expenditures by the employer, provided that the services rendered by the employee are not beyond the scope of the contract. This paragraph does not affect any reporting obligation imposed by Government Code Section 84303.

History: (1) New section filed 5/10/76; effective 6/9/76.
(2) Amendment to heading only filed 1/9/81; effective 2/8/81.

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January 27, 1989

Robert E. Leidigh, Esq.
California Fair Political Practices Commission
428 J Street
Suite 800
P.O. Box 807
Sacramento, CA 95804-0807

Re: Request for Advice re Pro Bono Legal Services.

Dear Mr. Leidigh:

We are writing to obtain your advice regarding the application of the Political Reform Act (Government Code §§ 81000-91015) to pro bono legal services provided by our firm in connection with a post-election contest pursuant to California Elections Code Section 20050. Tuttle & Taylor has provided substantial legal services on a pro bono basis to Garland Hardeman, a candidate for the Fourth District City Council seat in Inglewood, California. Mr. Hardeman filed an election contest challenging the results of a June 1987 run-off election in which he his opponent was declared the victor. Mr. Hardeman's election contest was premised upon allegations that his opponent's campaign had obtained a large total of illegally-cast absentee votes.

The Center for Law in the Public Interest contacted Tuttle & Taylor regarding Mr. Hardeman's contest and recommended the case as a worthy pro bono project given its large potential impact on the interpretation of election laws governing the absentee voting process. Tuttle & Taylor has provided substantial legal services in successfully representing Mr. Hardeman at trial during the elections contest in September 1987. Tuttle & Taylor has continued to represent Mr. Hardeman throughout the post-trial motions and during the present appeal which is scheduled for oral argument before Division Four of the Second Appellate District on February 14, 1989.

An issue has arisen as to whether Tuttle & Taylor's provision of pro bono legal services must be reported as "contributions" to Mr. Hardeman's campaign pursuant to Section 81002(a) of the California Government Code. We are unaware of any published decisions of the Fair Political Practices Commission which have directly addressed this issue. Accordingly, we request your guidance on this issue.

Please do not hesitate to contact us if you require further information regarding this inquiry, or if you would like a statement of our position on the issue.

Very truly yours,

TUTTLE & TAYLOR

By
Mark A. Borenstein

MAB:rll
cc: Mr. Garland Hardeman

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BY FEDERAL EXPRESS

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Re: Hardeman v. Thomas
File No. A-89-085

Dear Ms. Spitz:

Thank you for your advisory letter dated May 8, 1989. I agree that it raises a significant policy question under Proposition 73 and, consequently, would appreciate your requesting the Commission to defer consideration of the opinion until its August meeting. I expect, by that time, to have prepared a memorandum concerning your advice letter inasmuch as, at least preliminarily, your letter would have a substantial, chilling effect on pro bono services rendered in connection with the construction and application of California's election laws.

Thank you very much.

Sincerely,

TUTTLE & TAYLOR

Mark A. Borenstein

By
Mark A. Borenstein

MAB:pn

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:	)	
	)	
Opinion Requested by:	)	No. 89-001
Ross Johnson, Assembly	)	July 12, 1989
Member	)	
	)	

BY THE COMMISSION: We have been asked the following question by Ross Johnson, Minority Leader of the California Assembly. The opinion request is on behalf of Assembly Member Curt Pringle.

QUESTION

Are funds raised by Assembly Member Curt Pringle to defend a lawsuit challenging his election considered contributions, and thus subject to the contribution limits of Proposition 73?

CONCLUSION

Funds raised by Assembly Member Pringle to defend a lawsuit challenging his election are contributions, and thus are subject to the contribution limits of Proposition 73.

FACTS

Assembly Member Pringle was elected to the Assembly in the November 1988 general election. Some voters in Mr. Pringle's district are challenging the outcome of the election in federal court. The plaintiffs allege that unlawful conduct occurred at the polls.

Assembly Member Pringle is a named defendant in this action. Mr. Pringle will incur considerable legal expenses in defending the action. He is unable to personally afford these expenses. Consequently, he is contemplating establishing a fund for the purpose of financing his legal defense.

ANALYSIS

The Political Reform Act (the "Act"),[1/] as amended by Proposition 73, imposes limits on the amount of contributions which a candidate may accept from a particular source in a single fiscal year. (Sections 85301, 85303 and 85305.) The question before us is whether funds received by Assembly Member Pringle to defend a lawsuit challenging his election constitute "contributions" within the meaning of those provisions.

While it did include definitions of several terms, Proposition 73 did not include a definition of the term "contribution." Thus, we look for guidance to the definition of "contribution" as contained in the Act prior to the passage of Proposition 73. Section 82015 provides that a contribution includes a payment[2/] for which full and adequate consideration is not received, unless it is clear from the surrounding circumstances that the payment is not made for political purposes. Commission regulations further define a contribution as a payment received by or made at the behest of:

> A candidate, unless it is clear from surrounding circumstances that the payment was received or made at his behest for personal purposes unrelated to his candidacy or status as an officeholder....
>
> (Regulation 18215(b)(1).)

The Commission's opinion in In re Buchanan (1979) 5 FPPC Ops. 14, provides guidance on whether funds received for litigation constitute contributions under these provisions. Mr. Buchanan was the attorney for Roger Glidden, a candidate for supervisor in Inyo County. Mr. Glidden had received enough votes in the June 1978 primary to qualify along with two other candidates to be on the general election ballot. One of Mr. Glidden's opponents brought a lawsuit seeking to remove Mr. Glidden from the general election ballot on the ground that Mr. Glidden had not, in fact, received sufficient votes to qualify for that ballot. Mr. Glidden paid the cost of the litigation from his own funds and his attorney asked whether these funds were required

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1/ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

2/ "Payment" means a payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible. (Section 82044.)

to be reported as contributions on Mr. Glidden's campaign statements.

The Commission held based upon the above mentioned provisions that the funds were contributions and were thus reportable on the candidate's campaign statements. The Commission stated:

> Although payments for the costs of litigation are not generally thought of as having any connection with political campaigns, in the circumstances presented here and in similar circumstances, the litigation costs are just as key to the success of the campaign as traditional campaign costs such as mailings and media advertisements. When expenditures are made to support litigation aimed at gaining a place on the ballot for a candidate or measure, aimed at keeping a candidate or measure off the ballot, or challenging the results of an election, the expenditures are made for the purpose of influencing the outcome of the election in favor of or against a particular candidate or measure and should be reported. (Emphasis added.)
>
> In re Buchanan, supra, at 15-16.

Thus, based on Buchanan, funds raised by Assembly Member Pringle to defend litigation challenging the results of the election would be considered "contributions." The expenditures are made for the purpose of influencing the outcome of the election in favor of or against a particular candidate.

Case law supports the Buchanan opinion. In Thirteen Committee v. Weinreb (1985) 168 Cal. App. 3d 528, the First District Court of Appeal, citing Buchanan, held that contributions received and expenditures made to pay attorney fees incurred by a candidate in a local election in prosecuting a defamation action against an opponent were reportable under the Act. In reaching its conclusion, the court rejected the argument that the statutory phrase "political purposes," was ambiguous noting that any ambiguity is cured by the Commission's regulations. (Thirteen Committee v. Weinreb, supra, at p. 532.) The court also rejected the argument that the term "contribution," was not intended to cover expenditures for private litigation. The court stated:

> Under the administrative guidelines adopted by the Commission, the statutory term is interpreted to mean "for the purpose of attempting to influence the action of the voters for or against the nomination or election of a candidate...." (Cal. Admin. Code tit. 2, §18225, subd. (a).) Although the

> guideline exempt payments made for personal purposes "unrelated to his candidacy" (Cal. Admin. Code, tit. 2 §18225, subd. (b)(1)), the Commission has officially interpreted the proviso to include litigation expenses of a candidate seeking to remove an opponent from the ballot as a reportable expenditure noting in part that "when expenditures are made during the course of a campaign for litigation designed to protect or vindicate the personal reputation of a candidate, those expenditures generally are made to forward the fortunes of the candidate in the election and should also be reported." (In re Request of Buchanan (1979) 5 Ops. Cal. Fair Political Practices Com. 14, 16.) Such official interpretation of governing statutes and regulations is entitled to deference by the courts.
>
> (Thirteen Committee v. Weinreb, supra, at p. 532.)

Importantly, the court also held that the obligation to disclose included contributions and expenditures which occurred after the election. The court stated:

> Moreover, the lawsuit retained its political purpose even after the election insofar as the attorney fees could be properly characterized as political "expenditures."...The evidence suggests that Weinreb sought to deter the Howells from preparing future "hit pieces" and to protect her reputation against similar attacks in future political contests. Even such subordinate aims bear some reasonable relationship to her "status as an officeholder" within the requirement for reportable expenditures....Additionally, section 82007 broadly defines "candidate" as any person seeking nomination or election whether the specific elective office is known. The trial court found that Weinreb was a candidate; and the evidence established that Weinreb eventually sought another elective term as mayor. Thus, she remained a "candidate" under a duty to report her

> expenditures, including legal expenses incurred and paid in prosecuting the defamation lawsuit.
>
> Thirteen Committee v. Weinreb, supra at 536.

However, Buchanan and Weinreb were decided prior to the passage of Proposition 73, when the conclusion that certain payments were contributions merely required reporting of the contributions. The question is whether, in light of Proposition 73's contribution limits, that conclusion should change.

Assemblyman Johnson suggests that application of the contribution limits to the present situation would allow a group of individuals to tie up a candidate in litigation. He suggests that this would deny a candidate the ability to raise contributions for future elections. On the other hand, the purpose of the contribution limitations, like the reporting provisions, is to prevent at least the appearance of corruption which occurs when a public official receives excessive amounts of contributions from one or more contributors. Typically, such defense funds are raised from the same persons who provide campaign contributions to the candidate. Clearly, such funds are no less corrupting simply because of their usage for litigation rather than normal campaign expenses.

Furthermore, there is nothing in Proposition 73 or in the ballot materials for Proposition 73 to indicate that consideration of what is a "contribution" was to be modified in any way by Proposition 73. On the contrary, the ballot argument in favor of Proposition 73 stated:

> Currently in California there is NO LIMIT on the amount that any one DONOR can CONTRIBUTE to a CANDIDATE for office. Contributions of $10,000, $20,000 or $30,000 are routine. $100,000 contributions are becoming commonplace. Proposition 73 will place a reasonable contribution limit on how much any one donor can give to a candidate. (Emphasis added.)
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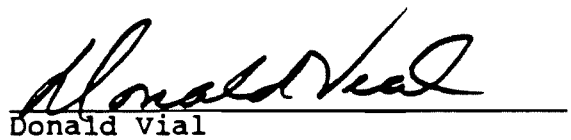
> Ballot pamphlet, June 1988 Primary Election at 34.

Prior to Proposition 73, the Commission would have considered funds raised for litigation to defend a lawsuit challenging the outcome of an election to be contributions. Absent any indication that the term "contribution" has been modified by the initiative, and given the similar purposes of the contribution reporting and limitation requirements, we believe the

funds must be considered contributions within the meaning of the contribution limits of Proposition 73.[3/] Once Assembly Member Pringle raises funds for the litigation in an amount equal to the applicable contribution limit for a fiscal year from a single source, he may not accept other contributions for his election from the same source in that same fiscal year.[4/] (Regulation 18520(c).)

Approved by the Commission on July 12, 1989.
Concurring: Commissioners Vial, Fenimore and Rattigan.
Dissenting: Chairman Larson and Commissioner Aparicio.



Donald Vial
Commissioner

[3/] Assembly Member Pringle is also the subject of a recall effort. We have advised Assembly Member Pringle that funds raised to defend that effort are not subject to the contribution limitations of Proposition 73 because the recall campaign is a ballot measure. (Pringle Advice Letter, No. A-89-155; copy attached.) That advice is distinguishable from the present situation because the term "measure" specifically includes a "recall procedure whether or not it qualifies for the ballot." (Section 82043.)

[4/] Assembly Member Johnson has also asked whether the plaintiffs in the lawsuit are subject to the Act's reporting and contribution limitation provisions. Since that portion of his request involves application of the Act to a third party, we are treating it as a request for informal assistance pursuant to Regulation 18329(c), and limiting our advice to a general explanation of the requirements of the Act.

If the plaintiffs in the lawsuit raise sufficient funds to qualify as a committee, their activities become subject to the Act's reporting provisions. (Section 82013 and 82015.) If that committee is controlled by a candidate, it will be subject to the contribution limitations applicable to candidate controlled committees. If the committee is not candidate controlled, it will, as with other non-candidate controlled committees, be subject to the contribution limitations only with respect to funds to be used to make contributions directly to candidates for elective office. (Section 85303(c).)